**EYONG IDAM**

**V.**

**FEDERAL REPUBLIC OF NIGERIA**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 13TH DAY OF MARCH, 2020

SC.662/2016

**LEX (2020) – SC. 662/2016**

**OTHER CITATIONS**

3PLR/2020/18 (SC)

(2020) LPELR-49564(SC)

**BEFORE THEIR LORDSHIPS**

OLABODE RHODES-VIVOUR, JSC

CHIMA CENTUS NWEZE, JSC

AMINA ADAMU AUGIE, JSC

EJEMBI EKO, JSC

PAUL ADAMU GALUMJE, JSC

**BETWEEN**

EYONG IDAM - Appellant(s)

AND

FEDERAL REPUBLIC OF NIGERIA - Respondent(s)

**ORIGINATING COURT(S)**

1. COURT OF APPEAL, FEDERAL CAPITAL TERRITORY, ABUJA DIVISION

2. HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, FCT

**REPRESENTATION**

G. O. ADIH, ESQ. - For Appellant

AND

IBRAHIM ANGULU ESQ., with him Nureni Usman. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE:- Ingredients of - Section 282 of the Penal Code – What the prosecution must establish to succeed

CRIMINAL LAW AND PROCEDURE - SENTENCING:- Trial Court’s exercise of discretion – Proper exercise of - Circumstances under which an appellate Court will not interfere with the exercise of in sentencing imposed by the lower Court

CRIMINAL LAW AND PROCEDURE - SENTENCING:- Minimum sentence – Discretion of court thereto – Young first offender convicted of rape – Whether ground for trial judge to exercise discretion to impose minimum sentence

CRIMINAL LAW AND PROCEDURE - OFFENCE OF RAPE: Rape of minor - Admission that there was consensual sex and penetration by accused person – Whether corroboration required to convict

CRIMINAL LAW AND PROCEDURE - OFFENCE OF CRIMINAL FORCE AND ASSAULT:- Proof of in regard to sexual assault – Threat of use of force – How treated

CONSTITUTIONAL LAW - JUDICIARY:- APPELLATE POWERS - Appellate jurisdiction of the Supreme Court – Whether can entertain an appeal directly from the decision of the High Court - Section 233(1) of the 1999 Constitution in review

CHILDREN AND YOUNG PERSONS’ LAW:- Sexual Offences and Justice Administration – Rape of minor – Evidence of consent and multiple sexual encounter with minor before the incidence charged – Legal effect

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - APPEAL TO THE SUPREME COURT: Appellate jurisdiction of the Supreme Court – Whether can entertain an appeal directly from the decision of the High Court - Section 233(1) of the 1999 Constitution in review

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S):- Attitude of the Supreme Court to invitation to interfere with concurrent finding(s) of fact(s) of Lower Courts

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

Eyong Idam, the Appellant herein, was arraigned before the High Court of the Federal Capital Territory on a two count charge of -

(i) rape contrary to Sections 282 (1)(a) -(c) (punishable under Section 283); and

(ii) criminal force contrary to Section 265,

all of the Penal Code Law. The Appellant was a Policeman, with a sworn duty to protect young persons, including the prosecutrix, who was 13 years of age at the time of the incident.

He pleaded not guilty. In order to prove its case, the prosecution called four witnesses and tendered in evidence the statements of the raped person (prosecutrix), her father and that of the accused person/the Appellant admitted and marked Exhibits A, B and D respectively. Exhibit D was later expunged. The trial Judge in his judgment found the Appellant guilty as charged and sentenced him to ten years' imprisonment on count 1 and one-year imprisonment on count 2. Both sentences were ordered to run concurrently. Aggrieved, the appellant appealed to the Court of Appeal, Abuja Division which resolved against him and dismissed his appeal.

DECISION(S) APPEALED AGAINST

1. The Court of Appeal upheld the conviction and sentence handed down by the trial Court.

2. the trial Judge found the Appellant guilty as charged and sentenced him to ten years' imprisonment on count 1 and one-year imprisonment on count 2. Both sentences were ordered to run concurrently.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“1. Whether the prosecution can be said to have proved its case beyond reasonable doubt in view of the fact that the essential ingredients of the offences alleged against the Appellant were not established.

2. Whether the testimonies of both the PW2 and PW4 do not amount to hearsay evidence and thus not unsafe for the Court below to rely on while affirming the judgement of the Trial Court.

3. Whether the learned justices of the Court below were right to have upheld the Appellant's sentences of 10 years and 1-year imprisonment for the offences of Rape and criminal force respectively to run concurrently from the date of judgment (8th July, 2009) when the Appellant had been in prison custody since 12th April, 2006 a period of over 3 years before the date of judgment?”

*BY RESPONDENTS*

“1. Whether the Respondent has proved its case of rape and criminal force beyond reasonable doubt to justify the conviction of the Appellant.

2. Whether the sentence of the High Court reaffirmed by Court of Appeal is legally right.”

*AS ADOPTED BY COURT*

“[The] only issue calling for determination of this appeal is whether the Lower Court was right in affirming the decision of the Trial Court, having regard to the evidence adduced at the trial, and if so whether the sentences passed on the Appellant are not excessive.”

DECSION OF SUPREME COURT

1. The punishment for rape as provided under Section 283 of the Penal Code is life imprisonment, and a mandatory sentence of fine. The Trial Court imposed a sentence of ten years' imprisonment and left out the mandatory fine. I am of the firm view that the Trial Court was sufficiently magnanimous in the manner it imposes sentence of imprisonment. The learned trial Judge was also lenient in passing sentence under Section 265 of the Penal Code. I therefore have no reason to interfere with the exercise of the Trial Court's discretion which was affirmed by the Lower Court.

2. Finally, this appeal is against the concurrent findings of the trial court and the Court of Appeal and the attitude of this Court is that it will not interfere with those findings, unless it is shown that they are perverse. The Appellant has failed to convince [the Court] to so interfere with these concurrent findings. The sole issue formulated by me is therefore resolved against the Appellant. This being so, this appeal shall be and it is hereby dismissed.

**MAIN JUDGMENT**

PAUL ADAMU GALUMJE, J.S.C. (Delivering the Leading Judgment):

The Appellant herein, was arraigned before the High Court of the Federal Capital Territory on a two count charge of rape contrary to Sections 282 (1)(a) (b) and (c) and punishable under Section 283 as well as criminal force contrary to Section 265, all of the Penal Code Law. On the 12th of April, 2006, the two count charge was read and explained to the Appellant and he pleaded not guilty. In order to prove its case, the prosecution called four witnesses and tendered in evidence the statements of the prosecutrix, the prosecutrix's father, as well as that of the Appellant and they were admitted and marked Exhibits A, B and D respectively. Exhibit D was later expunged along with the evidence of PW3 who did not turn up for cross-examination. After a careful consideration of the evidence before him, the learned trial Judge in his reserved and considered judgment found the Appellant guilty as charged and sentenced him to ten years' imprisonment on count 1 and one-year imprisonment on count 2. Both sentences were ordered to run concurrently.

The Appellant was dissatisfied with the decision of the trial Court. Being aggrieved, he appealed to the Court of Appeal, Abuja Division and submitted two issues for determination of his appeal. The two issues were resolved against him and his appeal was dismissed. Again, the Appellant is dissatisfied with the decision of the Court of Appeal and has now brought this appeal. His notice of appeal, filed on the 8th of July, 2016 contains three grounds of appeal. Parties filed and exchanged briefs of argument. Mr. Abdullahi Haruna, learned Counsel for the Appellant formulated three issues for determination of this appeal and they read as follows:-

1. Whether the prosecution can be said to have proved its case beyond reasonable doubt in view of the fact that the essential ingredients of the offences alleged against the Appellant were not established.

2. Whether the testimonies of both the PW2 and PW4 do not amount to hearsay evidence and thus not unsafe for the Court below to rely on while affirming the judgement of the Trial Court.

3. Whether the learned justices of the Court below were right to have upheld the Appellant's sentences of 10 years and 1-year imprisonment for the offences of Rape and criminal force respectively to run concurrently from the date of judgment (8th July, 2009) when the Appellant had been in prison custody since 12th April, 2006 a period of over 3 years before the date of judgment?

Mr. Ibrahim Angulu, learned counsel for the Respondent, leading two other counsel submitted two issues for determination of this appeal, in the following terms:

1. Whether the Respondent has proved its case of rape and criminal force beyond reasonable doubt to justify the conviction of the Appellant.

2. Whether the sentence of the High Court reaffirmed by Court of Appeal is legally right.

I have read the parties' briefs of argument and I am of the firm view that the only issue calling for determination of this appeal is whether the Lower Court was right in affirming the decision of the Trial Court, having regard to the evidence adduced at the trial, and if so whether the sentences passed on the Appellant are not excessive.

Learned Counsel for the Appellant in his argument, submitted that the prosecution failed to prove the essential element of the offence of rape, as it failed to prove that the Appellant's penis penetrated the vagina of PW1, the prosecutrix. Learned Counsel cited the authority of Posu v. State (2011) 2 NWLR (Pt. 1234) 393 at 416-417, paras F-B, in support of his submission that where in a charge of rape, penetration of the vagina is not proved, the accused will be discharged.

On the sentence passed on the Appellant, Learned Counsel submitted that the sentence of 10 years and one year for the offences of rape and criminal force respectively is excessive, bearing in mind the age of the Appellant and for the fact that he is a first offender who has been dismissed from his employment as a result of this case. According to the learned counsel, these factors are enough to mitigate the punishment. In aid learned counsel cited and relied on the authority of Ekpo v. State (1982)146 NSCC 146 at 155. In conclusion, learned counsel urged this Court to allow the appeal. In reply, Learned Counsel for the Respondent submitted that the prosecution did prove at the trial court all the ingredients of the offence of rape.

On the issue of sentence, Learned Counsel submitted that the Trial Court imposed the sentences in exercise of its discretionary powers and this Court can only interfere with such exercise if it is shown that the Trial Court acted under a misconception of the Law or under a misapprehension of facts. In aid, learned Counsel cited Nwadiogbu v. A.I.R.B.D.A. (2010) 19 NWLR (Pt.1226) 364 at 381. Finally, Learned Counsel urged this Court to dismiss the appeal.

Section 282 provides as follows :-

“282(1) A man is said to commit rape who, save in the case referred to in Subsection (2), has sexual intercourse with a woman in any of the following circumstances: -

(a) against her will;

(b) without her consent;

(c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt.

(d) With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(e) With or without her consent, when she is under fourteen years of age or of unsound mind.

(2) Sexual intercourse by a man with his own wife is not rape, if she has attained to puberty.”

Section 283 of the same Penal Code provides as follows:-

“Whoever Commits rape, shall be punished with imprisonment for life or for any less term and shall also be liable to fine.”

For the prosecution to prove the offence of rape, it must establish the following ingredients: -

1. That the accused had sexual intercourse with the woman in question.

2. That the act was done in circumstances following under any one of the five paragraphs in Section 282 (1) of the Penal Code.

3. That the woman was not the wife of the accused; or if she was his wife that she had not attained puberty.

4. That there was penetration of the vagina of the victim no matter how slight by the accused's penis.

In the instant case, the Trial Court at page 154 paragraph two of the record of this appeal held:-

“In the course of this judgment, I have held that the prosecution had established that the prosecutrix was under fourteen years of age. By Section 282 (1)(e) of the Penal Code, it is rape to have sexual intercourse with or without the consent of a girl who is under fourteen years of age. I have also found that the accused person had sexual intercourse with the prosecutrix. The cumulative effect of these findings is that the ingredients of an offence under Section 282(1)(e) of the Penal Code have been made out by the prosecution.”

At pages 251 of the record, the Appellant admitted under cross-examination that he had had sexual intercourse with the prosecutrix more than six or seven times before this one for which he is standing trial. With this admission, the question of penetration of the vagina of the prosecutrix is no longer in controversy. The question is whether the victim was below 14 years as at the time of the commission of the offence. PW2 the father of the prosecutrix who had the record of her birth gave evidence that she was 13 years at the material time. Whether she consented to the sexual intercourse or not, the Appellant's act of sexual intercourse with her amounted to rape.

On the issue of penetration of the vagina, PW1, the prosecutrix gave evidence that she was raped. PW4 the medical doctor, who treated PW1 on admission at Wuse General Hospital, testified at page 228 of the record of this appeal as follows:-

“Further vaginal examination revealed fresh rim of hymen with a tear at the lower aspect of the vagina extending to the skin of the perineum. There was blood observed in the vagina and the area of laceration of the skin.”

Clearly, this piece of evidence corroborates the evidence of PW1 that she was raped. Not only that the evidence has clearly shown that there was penetration of the prosecutrix's vagina by the Appellant's penis. I have no doubt in my mind that the Appellant committed the offence of rape.

The question now is whether the Appellant used force against PW 1. PW 1 at page 172 of the Record of this appeal testified as follows: -

“I went close to him and he grabbed me and told me that if I shout that Mopol is to kill and go. When I was scared to shout, he pulled off my pant, fall me down on the ground and raped me.”

Pushing PW1 to the ground was clearly an act of criminal force. Since there is evidence of rape, any act of trespass to the body of PW 1 in preparation to commit an offence is clearly an act of criminal force. Criminal force is defined under Section 263 of the Penal Code thus:-

"Whoever intentionally uses force to any person without that person's consent: -

(a) While preparing to commit any offence

(b) In the course of committing any offence, or

(c) Intending by the use of such force, he will cause injury, fear or annoyance to the person to whom the force is used is said to use criminal force to that other.”

By this definition, the Appellant committed criminal force against PW1. The Lower Court was therefore right when it upheld the decision of the Lower Court on this score.

On the issue of the sentences, I agree with the learned counsel for the Respondent that the imposition of sentence on the Appellant was purely a matter of discretion. The Law is settled that the discretion of a Court must at all times be exercised not only judicially, but also judiciously on sufficient materials. See Udensi v. Odusote (2003) 6 NWLR (Pt.817) 545 at 558 para B; Ogbuehi v. Governor Imo State (1995) 9 NWLR (Pt.417) 53 University of Lagos v. M.I. Aigoro (1985) 1 NWLR (Pt.1) 143 at 148.

It is equally settled that where judicial discretion has been exercised bona fide uninfluenced by irrelevant consideration and not arbitrarily or illegally by the Court, the general rule is that the Appellate Court will not interfere. The punishment for rape as provided under Section 283 of the Penal Code is life imprisonment, and a mandatory sentence of fine. The Trial Court imposed a sentence of ten years' imprisonment and left out the mandatory fine. I am of the firm view that the Trial Court was sufficiently magnanimous in the manner it imposes sentence of imprisonment. The learned trial Judge was also lenient in passing sentence under Section 265 of the Penal Code. I therefore have no reason to interfere with the exercise of the Trial Court's discretion which was affirmed by the Lower Court.

Finally, this appeal is against the concurrent findings of the trial court and the Court of Appeal and the attitude of this Court is that it will not interfere with those findings, unless it is shown that they are perverse. The Appellant has failed to convince me to so interfere with these concurrent findings. The sole issue formulated by me is therefore resolved against the Appellant. This being so, this appeal shall be and it is hereby dismissed.

**OLABODE RHODES-VIVOUR, J.S.C.:**

I was privileged to read in draft the leading judgment prepared by my learned brother GALUMJE, JSC. Learned counsel for the Appellant was unable to prove that concurrent findings of the two Courts below are wrong, I found them to be correct.

Accordingly, there is no merit in this appeal. It is also dismissed by me.

**CHIMA CENTUS NWEZE, J.S.C.:**

My Lord, GALUMJE, JSC, obliged me a draft of the leading judgement delivered now. I agree with His Lordship that, being unmeritorious, this appeal deserves to be dismissed. Appeal dismissed.

**AMINA ADAMU AUGIE, J.S.C**.:

I had a preview of the lead judgment just delivered by my learned brother, GALUMJE, JSC, and I agree with him that this Appeal totally lacks merit. The Court of Appeal was right to affirm the decision of the trial Court, which “was well-founded on the law and the fact”. I also agree with its decision not to disturb the sentence passed by the trial Court on the Appellant. As the Court of Appeal aptly said:

It is common knowledge that the offence of rape is on the increase in this Country and Courts have a role to play in sending a clear message that it would not be tolerated and would be severely punished. Further, the Appellant, being a Police Officer at the time of the commission of the offence, was supposed to protect the Prosecutrix. He abused his position, used his profession to threaten, frighten and rape the helpless 13-year-old girl, the daughter of his fellow Policeman without shame. He had no excuse for what he had done and was lucky to have escaped with what I think was a light sentence, given the gravity and prevalence of the offence and the naked exercise of power.

In my view, it will amount to turning justice on its head if this Court disturbs the concurrent findings of the two Lower Courts that the Appellant was guilty as charged. The Appellant was a Policeman, who was supposed to protect a young girl, 13 years of age; instead he abused his position, and the trust reposed on him, by raping her. Thus, I also dismiss this Appeal in its entirety. Appeal dismissed.

**EJEMBI EKO, J.S.C.:**

I agree, as my learned brother, PAUL ADAMU GALUMJE, JSC, found and concluded that the conviction of the Appellant by the Trial Court, affirmed by the Lower Court, is not perverse.

The Appellant, citing the principle set out in EKPO v. THE STATE (1982) NSCC 146 at 155, had argued "that the learned trial Judge erred in the principle by not taking into consideration the fact that the Appellant is a young first offender and ought to have exercised his discretion in imposing a minimal sentence which should commence running from the 12th April, 2006 when his detention in prison custody commenced". In EKPO v. THE STATE (supra) this Court, on the facts of the case, stated that the trial Court is not bound to impose maximum sentence for an offence and that it is "free to exercise its discretion in that regard". The issue remains in the unfettered discretion of the trial Court. The settled principle on the power the appellate Court has to interfere with a discretion exercised by the Trial Court is that the appellate Court will not lightly interfere with a discretion properly exercised by the trial Court even if the Appellate Court would have exercised the same discretion differently. It is therefore incumbent on the Appellant to establish how the trial Court or the lower Court had exercised its discretion improperly.

This Court, by dint of Section 233(1) of the 1999 Constitution, as amended, is only empowered to hear and determine appeals from the Court of Appeal. It does not have jurisdiction to hear and determine appeals from the High Court or the trial Judge. The Appellant has, in my firm view, come to a wrong forum with his argument or complaint that the learned trial Judge erred in not applying the principle established in EKPO v. THE STATE (supra) and that he did not take into consideration the fact that the Appellant was a first offender in the order imposing custodial prison sentences for the offences of rape and criminal force. The Appellant, having come to the wrong forum, this Court will be acting ultra vires to interfere with the discretion exercised by the trial Court. It is on record though that the Lower Court had affirmed the sentences imposed on the Appellant.

Appeal dismissed.